IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-468

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THOMAS G. DIGNAN, JR.
G. MARSHALL MORIARTY
R. K. GAD III
WILLIAM S. EGGELING
225 Franklin Street
Boston, Massachusetts 02110
(617)423-6100
Attorneys for Petitioner

Of Counsel:
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110

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The petitioner, Public Service Company of New Hampshire, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on June 21, 1978.

OPINIONS BELOW

In the separately bound appendix submitted herewith are set forth the opinion (*App.* 2-18) and the judgment (*App.* 1) of the United States Court of Appeals for the First Circuit in *Public Service Company of New Hampshire* v. *United States Nuclear Regulatory Commission et al.*, No. 77-1419 (June 21, 1978). The decision is not yet officially reported. The portions of decisions of the Atomic Safety

and Licensing Board (Licensing Board) (*App.* 19-36) and Atomic Safety and Licensing Appeal Board (Appeal Board) (*App.* 37-51) of the United States Nuclear Regulatory Commission (NRC) which were on review in the Court of Appeals are also set out in the separately bound appendix. The Licensing Board decision is officially reported at 3 NRC 857. The Appeal Board decision is officially reported at 6 NRC 33.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254, 2350.

QUESTION PRESENTED FOR REVIEW

Whether the National Environmental Policy Act is to be construed as requiring or permitting the United States Nuclear Regulatory Commission to order a change in the routing of a transmission line associated with a privately-owned, and Commission licensed, nuclear electric generating plant, which routing was previously approved by competent state authority, because, in the Commission's judgment, such a change would mitigate the environmental impact of the line.

STATUTES AND REGULATIONS INVOLVED

The case involves the statutes and regulations listed below, and which are reproduced in the separately bound appendix submitted herewith. *App.* 117-120.

1. Atomic Energy Act § 11(v), 42 U.S.C. § 2014(v).
2. Atomic Energy Act § 11(cc), 42 U.S.C. § 2014(cc).
3. Atomic Energy Act § 271, 42 U.S.C. § 2018.
4. 10 C.F.R. § 50.2(b).
5. National Environmental Policy Act § 102, 42 U.S.C. § 4332.

STATEMENT OF THE CASE

State Approval of Petitioner's Transmission Lines

Under New Hampshire law any electric utility desiring to construct a transmission line in that state must obtain permission to do so from two state agencies: The New Hampshire Site Evaluation Committee (NHSEC) and the New Hampshire Public Utilities Commission (NHPUC). This permission is granted only after a full adjudicatory hearing conducted jointly by both agencies. NHRSA 162-F. The process culminates in the issuance by NHPUC of a "Certificate of Site and Facility," NHRSA 162-F:6, which, *inter alia,* lays out the route to be used for the transmission line. The issuance of the certificate is preceded by findings with respect to the environmental impact of the route, the effects on system stability and reliability, and on regional development, aesthetics and historic sites. NHRSA 162-F:8(I). In addition, the utility must obtain approval of specific water crossings from NHPUC, NHRSA 371:17-20, and specific highway crossings from the New Hampshire Department of Public Works and Highways (NHRSA 254:2-3); it also must obtain necessary dredge and fill permits from the New Hampshire Special Board, NHRSA 483-A.

On February 1, 1972, the petitioner, Public Service Company of New Hampshire (PSCO), applied to NHSEC and NHPUC for a Certificate of Site and Facility for, *inter alia,* transmission lines for the proposed Seabrook Nuclear Power Station.[1] Thirty-two days of hearings were held

[1] PSCO also sought approval of the station itself.

before NHSEC[2] and NHPUC sitting jointly during the period June 19, 1972 - May 25, 1973. The requisite findings having been made by all other state agencies,[3] the NHPUC, on January 29, 1974 issued a Certificate of Site and Facility for Seabrook Station and its three associated transmission lines, *App.* 73-74, designating particular routes therefor.

As of January 29, 1974, PSCO also had an application for Construction Permits for Seabrook Nuclear Power Station pending before the United States Atomic Energy Commission (AEC), the predecessor to the United States Nuclear Regulatory Commission (NRC). (Both AEC and NRC will hereinafter be referred to as "the Commission.")[4]

Proceedings Before the Commission

When the State of New Hampshire issued the Certificate of Site and Facility with respect to the Seabrook transmission lines and routes, the Commission had never asserted

[2] The NHSEC consists of the following: (1) the Executive Director of the New Hampshire Water Supply and Pollution Control Commission (NHWSPCC) who is the Chairman of the NHSEC, (2) the Chief Aquatic Biologist of NHWSPCC, (3) the Commissioner of the Department of Resources and Economic Development, (4) the Director of Fish and Game, (5) the Director of the Office of Planning, (6) the Chairman of the Water Resources Board, (7) the Director of the Radiation Control Commission, (8) the Executive Secretary of the Air Pollution Control Commission, (9) the Commissioner of the Department of Health and Welfare, (10) the Director of the Division of Parks, (11) the Director of the Division of Resources, (12) the Chairman of the NHPUC and (13) the Chief Engineer of the NHPUC. NHRSA 162-F:3.

[3] NHPUC approved necessary water crossings, *App.* 63-65; the Department of Public Works and Highways approved highway crossings, *App.* 81-84; and the Special Board gave necessary dredge and fill permissions, *App.* 85.

[4] The functions of the AEC were transferred to NRC in July of 1975 by the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* (Supp. V.)

any authority to direct the routing of transmission lines associated with a nuclear power station. Eleven months later, however, on December 20, 1974, a Commission Appeal Board[5] issued a split decision in which it held that the passage of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, had had the effect of conferring upon the Commission the power to reroute transmission lines associated with nuclear power plants if, in the Commission's judgment, such rerouting would mitigate the environmental impact of the lines. *The Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974) (hereafter *"Greenwood"* and reproduced at *App.* 86-116). The Appeal Board rejected the argument of the utility in that case (made also by PSCO herein) to the effect that NEPA consideration of transmission lines is confined to assessing their environmental impact and factoring the costs determined from the assessments into the NEPA "cost/benefit ratio" for the plant as a whole. 8 AEC 944, *App.* 98. *But see* 8 AEC 954-56, *App.* 113-16 (Dr. Buck dissenting).

PSCO's Seabrook application was governed by the Appeal Board's decision in ALAB-247. 3 NRC 935, *App.* 34. After a lengthy hearing before the Licensing Board, which included eleven days devoted to the subject of transmission routes, the Licensing Board issued a decision wherein it

[5] Initial hearings on nuclear license applications are conducted before Atomic Safety and Licensing Boards which are three-man tribunals made up usually of a lawyer chairman and two technical members. 42 U.S.C. § 2241, 10 CFR § 2.721. An appeal from a Licensing Board decision may be taken as a right to the Atomic Safety and Licensing Appeal Board. 10 CFR §§ 2.762, 2.785. After that a disappointed party may petition the Commission for review, which review is granted only as a matter of discretion. 10 CFR § 2.786.

directed two changes in the transmission routes[6] which had been previously approved by the New Hampshire agencies. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-76-26, 3 NRC 857 (1976). *App.* 21-35. These findings, rulings and orders were appealed by PSCO to the Appeal Board which upheld the decision of the Licensing Board. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (July 26, 1977). See *App.* 37-50.

After Commission review was denied, *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-77-22, 6 NRC 451 (September 15, 1977), PSCO petitioned the United States Court of Appeals for the First Circuit for review pursuant to 28 U.S.C. § 2342 and 42 U.S.C. § 2239.

The Decision of the Court of Appeals

The Court of Appeals, acknowledging that the question presented was "important" and "one of first impression," upheld the Commission's assertion of the right to reroute transmission lines associated with a privately-owned nuclear power plant. Reasoning from the proposition that

[6] One of the changes was a rerouting of the line through an area known as Packer Bog rather than skirting it. By the time the matter came before the Commission's Licensing Board, it was apparent to everyone, including state officials, that this was a better route; consequently, PSCO sought "authorization" of that route change from the Licensing Board (to the extent such "authorization" was required, *see App.* 34), and indicated that it believed that the state authorities would allow such a change, *see App.* 6, 17. PSCO specifically sought from NRC "authorization" for the change, not an "order" for it. This was to avoid a Catch-22 situation when the state did direct the change in the future. Thus, it is not "surprising" as the Court found, *App.* at 17, that PSCO viewed state-approved routes as "final and binding" despite its declaration that it believed the state would subsequently direct the change in the Packer Bog area.

NEPA requires all "agencies to minimize all unnecessary adverse environmental impact . . . except when specifically excluded by statute or when existing law makes compliance... impossible," the Court of Appeals divined in the administrative history of the Commission a "long-standing" interpretation of the statutory term "utilization facility" as including equipment associated with the reactor. *App.* 7, 9-11. The Court of Appeals further found that, based upon this interpretation, the Commission "at least since 1971 (when regulations relating to transmission lines were first proposed), has claimed the specific right to oversee the siting of transmission lines."[7] *App.* 11. Characterizing PSCO's effort as an improper "collateral attack," *App.* 10-11, on the Commission's interpretation of its statute, the Court of Appeals held that the Commission was empowered under the Atomic Energy Act ("AEA"), as modified by NEPA,[8] to require the specific changes at issue here.

The Court of Appeals also rejected the petitioner's argument that Section 271 of the AEA, 42 U.S.C. 2018, *App.* 117, specifically precluded the Commission's assertion of authority to route transmission lines. *App.* 13-15. The Court of Appeals dismissed that section as a "garden-variety non preemption clause," *App.* 14, and then compounded its error by ruling that the Commission's actions

[7] What the court omits to note is that the reference to "transmission lines" contained in the "first proposed" regulations, 36 Fed. Reg. 3255, 3258 (Feb. 20, 1971), was deliberately removed almost immediately, 36 Fed. Reg. 12733 (July 7, 1971). Later in its decision, *App.* 12 at n.12, the court refers to certain regulations published in 1971 (36 Fed. Reg. 22,848 (Dec. 1, 1971)), effective in March of 1972, 37 Fed. Reg. 5745 (March 21, 1972) and now codified as 10 CFR § 50.10(e)(1)(iv). However, that regulation lists the things that may be done prior to grant of a license and characterizes "transmission lines" as "service facilities".

[8] *See App.* 7 n.6.

had not in this case preempted the transmission line routing authority of the State of New Hampshire.[9]

REASONS FOR GRANTING THE WRIT

I. The Sweeping Change In Federal-State Relationships Which This Decision Announces Presents an Important Question of Federal Law Which Should Be Settled By This Court.

In *Greenwood,* a Commission Appeal Board agreed to consider — at an interlocutory stage — the same question which is presented herein because it recognized that: "[it] present[s] a legal issue of first impression and, perhaps more importantly, because [its] prompt resolution is significant for proceedings involving all facilities needing new power lines for their commercial operations." 8 AEC 937, *App.* 88. The Court of Appeals for the First Circuit, the

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[9] In rejecting the "preemption" claim the court pointed to (1) PSCO's assessment of the likelihood that the New Hampshire authorities would agree that subsequent developments made one of the changes preferable and (2) to the fact that:

> "[A]t oral argument the Commission stated that, should PSCO be unable to obtain approval of the new routing from the New Hampshire Public Utilities Commission, it could come back to the Commission. We, therefore, find no ineluctable conflict between New Hampshire and the Commission on this question." *App.* 17.

As to the first argument (the PSCO position on one of the routes), see note 6, *supra.* In addition, note that PSCO did not argue that NRC "authorized" changes created a conflict, rather that NRC "ordered" changes created the conflict. As to the second argument, created out of an oral and last minute concession before the Court of Appeals, it is to be noted that NRC has yet to amend the construction permits to say NRC will acquiesce in a state adherence to its previously approved routes. PSCO thus must apparently remain the tennis ball between New Hampshire and NRC until some court decides who actually has the authority.

first judicial body to confront this issue,[10] similarly recognized that this issue, "one of first impression," was "an important one." *App.* 3. These perceptions were not exaggerated. The issue, which the petitioner now asks this Court to consider, is of vital importance both to the nuclear power industry and to the nation as a whole.

To understand the full import of the question, it is important to note that, prior to *Greenwood,* the Commission had *never* asserted authority to reroute transmission lines for any reason. Prior to the instant case, moreover, it had never purported to order changes in transmission routes previously approved by competent state authority. In fact, prior to this case the Commission had never actually ordered any applicant before it to alter a transmission route. That the Commission has now attempted to exercise such authority — in the face of contrary route approval by the State of New Hampshire and based upon an evaluation of *environmental*[11] significance — is plainly a step of some gravity.

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[10] The *Greenwood* interlocutory ruling has not, for reasons unrelated to the transmission line issue, reached a posture where judicial review is possible. Recently, the applicants in the *Greenwood* proceeding sought a rulemaking on the issue, which was denied. *The Detroit Edison Co., Inc.,* Dkt. No. PRM-50-15 (Commission, February 22, 1978). Review of this denial is now pending in the United States Court of Appeals for the Sixth Circuit. *The Detroit Edison Company* v. *NRC,* and related case, Nos. 78-3187 & -3196 (filed April 20, 1978). However, unlike the instant case, the issue of a prior state approval is not presented in the *Greenwood* matter. See 8 AEC 946 & n.20, *App.* 100 & n.20.

[11] The Commission has never claimed that the changes ordered here are required for safety reasons. Indeed, the Commission's only safety regulations governing offsite power sources makes clear that the route of *"circuits"* to and from the plant is irrelevant. They may all be on a single right-of-way; they need only be "separate". In short, two circuits, one above and one below ground, or both below ground, on the same narrow route — and on *any* route — would fully satisfy the regulation. 10 CFR Part 50, App. A, Criterion 17.

It is not surprising that the Commission's "discovery" of this remarkable power comes so late in its history. The Atomic Energy Act certainly contains no provision purporting to confer upon the Commission a power to route, much less to *reroute*, electric transmission lines. Indeed, the Commission's interpretation of "utilization facility" — upon which it relies for the newfound authority to route transmission lines — is at best distended.[12] Not only is the AEA devoid of any affirmative grant of such power, it contains an explicit disavowal by Congress of any intent thus to disrupt the States' traditional authority in the area of the transmission of electric power.

As originally enacted, section 271 of the Atomic Energy Act of 1954 read as follows:

> "Sec. 271. Agency Jurisdiction. — Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power." 68 Stat. 960 (1954).

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[12] The Commission claims authority over transmission lines on the basis that they may properly be treated as "utilization facilities" within the meaning of the Act. That construction of the statutory term is hardly a non-controversial one.

As defined in the Act:

> "The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission." AEA § 11(cc).

Including electric transmission lines within this statutory definition involves a significant expansion of its apparent meaning. *See Greenwood*, 8 AEC 936, 947-56, *App.* 102-16 (Dr. Buck, dissenting).

During Senate debate on the Atomic Energy Act of 1954, the Senate sponsor of the Act described section 271, *inter alia*, as:

> "a safeguard and as an assurance that the existing authority of the Federal Power Commission on the Federal law or agency and the *existing authority of the State agencies and the existing authority of local agencies, whatever they may be in connection with the transmission of electric energy, would not be disturbed or interfered with in any way.*" 100 Cong. Rec. 11710 (remarks of Sen. Hickenlooper) (July 27, 1954) (emphasis added).

Referring to the relationship of section 271 to the Atomic Energy Act as a whole, he observed:

> "We say that nothing in this act shall interfere with or affect the authority or regulations of any . . . State or local agency with respect to the generation, sale or transmission of electric power. We say that this act does not interfere with the rights and the power and the authority of any . . . State or local regulatory body whatever; and the power and the authority which may be there now for the transmission of electricity or the generation of electricity or whatever the authority may be is not changed." *Id.*

Section 271 was further described as follows:

> "It is not an authority given in a negative way. It is a *positive negation of any intent by this statute* to interfere with the existing laws and the existing authorities, State and Federal, that have to do with electricity." *Id.* at 11709 (emphasis supplied).

Section 271 was "designed to keep the regulatory authority exactly as it is now, traditionally and under the law." 100 Cong. Rec. at 11567 (remarks of Senator Hickenlooper) (July 26, 1954). It cannot be doubted that, traditionally, the question of where transmission lines will go — *i.e.*, who gets a transmission tower in his backyard — has been reserved to state and local authorities, rather than to a federal bureaucracy.

In 1965, section 271 was amended to its present form by the addition of the italicized language:

> "Agency Jurisdiction. — Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power *produced through the use of nuclear facilities licensed by the Commission:* Provided, *That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission.*" P.L. 89-135 (1965) (emphasis supplied).

This amendment was in direct response to a then recent court decision holding that section 271 precluded the Commission from overriding local zoning ordinances in the construction of a transmission line to a Commission-owned facility. *Maun* v. *United States,* 347 F.2d 970 (9th Cir. 1965). The sole purpose of the amendment was to make section 271 inoperative when the facility involved was one that the Commission itself owned or operated. H. R. Rep. No. 567, 89th Cong. 1st Sess., 1965 U.S. Code Cong. & Admin. News 2775, 2779-81, 2783-84. The amendment made no change with respect to Commission authority over transmission lines or routes associated with Commission-*licensed* facilities, such as petitioner's. To the contrary, the amendment ratifies the *Maun* result as applied to licensed facilities. As amended, section 271 operates in this case as a positive bar to the Commission's assertion of authority to route transmission lines in the State of New Hampshire differently than has the State of New Hampshire.

That Congress intended to keep the Commission out of the transmission routing business is further manifested by its decision not to give it any authority to condemn transmission rights-of-way for licensees. The assertion of a power to route a transmission line without the power to condemn the land for the route is, by definition, a useless exercise. Congress was aware of this. For example,

the Tennessee Valley Authority was specifically granted the power of eminent domain to acquire its transmission routes. Tennessee Valley Authority Act, § 4(i), 48 Stat. 60 (1933), as last amended, 49 Stat. 1075, (1935), 16 U.S.C.A. § 831c(i). See *United States ex rel. TVA* v. *Welch,* 327 U.S. 546, 554 (1946).

Indeed, NRC was given the power of eminent domain in order to acquire land in connection with an NRC-owned facility. 42 U.S.C. § 2063. See also S. Rep. No. 1699, 83rd Cong., 2d Sess. (1954), 2 U.S. Code Cong. & Admin. News 3456, 3470 (1954). The conspicuous absence of any such power with respect to the nuclear power plants which the Commission licenses is forceful evidence of congressional intent regarding the limits of that licensing authority.

Despite all the foregoing manifestations of congressional intent, the Commission has, incrementally, reached the point of asserting not only that it is empowered to route transmission lines, but that it can *reroute* them based upon its perceptions of environmental impact. The Court of Appeals for the First Circuit has now upheld this aggrandizement of power, reasoning that the AEA, as modified by NEPA, confers such authority upon the Commission. Consequently, decisions that can have disastrous effects on local landowners are now to be made by a federal agency in Washington, D.C. rather than by — and indeed contrary to those of — locally elected or appointed officials. In this case, where the NRC has ordered a route change to avoid a "natural area", the result is lines in the backyards of three private homes. 6 NRC at 87, 90, *App.* 45, 50. In addition, certain other adverse effects along the NRC-ordered routes would occur. 3 NRC at 890, *App.* 28. These are not decisions which Congress intended the NRC to make. If these statutes are now to be construed as working such a sweeping change in federal-state relations, that construction should be examined by this Court.

II. There Is A Conflict In the Circuits With Respect To the Interpretation of the Atomic Energy Act.

The decision of the Court of Appeals is in conflict with the decision of the Ninth Circuit in *Maun* v. *United States*, 347 F.2d 970 (1965). There the issue was whether the Commission could obtain, by eminent domain, certain property for construction and operation of electric transmission lines associated with a Commission nuclear research project. The defendant property owners contended that the Government's condemnation action was improper because the Commission could not construct or operate the lines without violating local ordinances. The district court rejected these contentions, and the property owners appealed.

On appeal, the Ninth Circuit stated the question presented to it as:

> "whether [the Commission] may construct and operate an overhead electric transmission line in disregard of local authority and regulations governing the character and location of such lines." 347 F.2d at 973.

After reviewing the legislative history of AEA § 271, summarized in section I, *supra*, the Court of Appeals rejected the Commission's position and held that the Government was precluded from attempting to locate its transmission lines contrary to the requirements of the responsible California authorities. 347 F.2d at 978.

As discussed previously, section 271 was amended following *Maun* to alter the result reached therein with respect to Commission-owned facilities. But in thus amending the section, Congress also reaffirmed the Ninth Circuit's interpretation of section 271 with regard to private, commission-licensed, activities. *See supra* at 10-12.

The Court of Appeals for the First Circuit has nevertheless held that the Commission may require, as a condition for obtaining a license, that private transmission lines be rerouted from the paths previously ordered by competent

New Hampshire authorities. This holding is thus in conflict with the Ninth Circuit's interpretation of section 271 in *Maun*, as well as with the Congress' ratification of that decision.[13] This conflict is, without more, sufficient reason for granting the instant petition.

III. The Reading Accorded NEPA By the Court of Appeals Is In Conflict With Applicable Decisions of This Court.

On numerous occasions this Court has made clear that NEPA is not to be read as amending or repealing any other statute. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, __, 55 L. Ed. 2d 460, 482, 98 S. Ct. 1197, 1214 (1978); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 319 (1975); *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973). And yet the Court of Appeals has construed NEPA in a fashion that effects a repeal of section 271 of the AEA. The section was included in the act to insure that the Commission would not even "disturb" New Hampshire's existing authority over transmission lines. Rerouting petitioner's transmission lines, contrary to the routes selected by state agencies established to regulate such matters, produces more than a disturbance.

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[13] The First Circuit effectively disregarded this conflict by virtue of its conclusion that there had been no "preemption" of the New Hampshire authorities involved here. As discussed elsewhere, *see* note 9, *supra*, however, this analysis is based upon the Court of Appeals' perception that — despite the Commission and the State having each ordered *different* routes for the *same* transmission line — one of those agencies will at some point acquiesce in the other's choice. Whether such a voluntary withdrawal from one of the outstanding positions will occur (a proposition substantially more dubious than the First Circuit's opinion suggests), that possibility does not obviate the present conflict between the regulatory authorities. It is therefore not an adequate basis for concluding that section 271, as interpreted by the *Maun* court, has not been abrogated. The prospect of some future solution to this conflict is, moreover, of obvious inutility to petitioner.

The decision of the Court of Appeals is in conflict with prior decisions of this Court in two other respects. First, section 103(b) of the AEA, 42 U.S.C. § 2133(b), commands that any applicant who satisfies the Commission's safety regulations "shall" be given a license. The effect of the Court of Appeals' decision is to empower, perhaps to require, the Commission to withhold a license in a case where all of the Commission's safety regulations have been complied with, notwithstanding the statutory limit on the Commission's power.[14] This ruling is in conflict with the repeated holding of this Court that "NEPA was not intended to repeal by implication any other statute." *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n,* 426 U.S. 776, 788 (1976); *United States* v. *SCRAP,* 412 U.S. 669, 694 (1973). Second, the Court of Appeals holds that the Commission has the power, not only to deny a license application where the overall cost-benefit balance is negative, but also to modify collateral, minor, and non-radiological features of a project in the absence of a finding that, but for the modifications, the balance would be negative; that is to say, that the Commission may tinker with the non-radiological details of the proposal as if it were the proprietor. In so holding, the Court of Appeals has ignored the distinction between NEPA's application to federal projects and NEPA's application to federal licensing of private projects that this Court has previously recognized. *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U.S. 289, 320 (1974). *See also Kleppe* v. *Sierra Club,* 427 U.S. 390, 419 (1976) (Marshall, J., concurring). The Court of Appeals' determinations, that NEPA effectively amends the AEA and that there is no distinction, for NEPA purposes, between private activity and federal projects, are in conflict with the decisions of this Court.

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[14] The opinion of the Court of Appeals makes it clear that it was NEPA which was thought to confer this additional authority. *See App.* 7 n.6.

CONCLUSION

This decision has put a federal bureaucracy in the business of deciding whose backyard gets a transmission tower. It further has construed NEPA as amending every licensing statute in the federal code. The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS G. DIGNAN, JR.
G. MARSHALL MORIARTY
R. K. GAD III
WILLIAM S. EGGELING

225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Attorneys for Petitioner

Of Counsel:

ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110